panies Act, delivery of a proper instrument of transfer is the only way by which a person can be registered as a shareholder. However, it became manifestly clear during the hearing of interpleader summons that until Chin Sow Lan proves her allegation there can be no basis for the foundation for the expectation to be sued. To say that there was is to speculate on what she intends to do to assert her right. The fact that she has tried in 1968 and failed might provide reasonable ground for the belief that she was having some difficulty in asserting her right. After this set back she has not shown any real desire to pursue her claim except to send the letter of the 14th August, 1969, just referred to. The excuse she gave for her inability to file a regular action is not worth a moment's notice. Even if there was anything in the way against her filing a proper action, she could easily have come to the court for the necessary directions or orders. The respondent company, on the other hand, preferred to let things go their own way but when pressed by the appellants thought it convenient to ask for interpleader relief. This they cannot do for there is absolutely nothing in Chin Sow Lan's claim which, so far as they are aware, could have been made a real foundation for the expectation to be sued in respect of the liability to register her as a shareholder.

I would accordingly allow this appeal with costs to the appellants in any event. This means that the appellants will now be at liberty to proceed with their application for summary judgment which is still pending in the court below.

Appeal dismissed.

Solicitors: *K. L. Devaser & Co.; Ranjit, Thomas & Kula; B. Kaher & Kirpal Singh.*

SEPANG OMNIBUS SDN. BHD. v. CHRISTINA LOH SOO PANG & ORS.

[F.C. (Ong C.J. (Malaya) Gill F.J. and Ong Hock Sim J.) July 23, 1970]

[Malacca — Federal Court Civil Appeal No. X. 114 of 1969]

Negligence — Appeal — Whether appeal court can alter apportionment of liability made by trial judge — Inferences from facts.

This was a case in which four vehicles were involved in an accident. The trial judge has found that the drivers of a military truck and of a taxi blameworthy in the proportion of 25% and 75% respectively and had awarded damages accordingly. The owners of the taxi appealed against the judgment and contended that on the evidence the learned judge should have held that the driver of the military truck was the sole cause of the accident or that he and the driver of another motor car involved in the accident were jointly at fault.

Held, allowing the appeal: on the evidence as a whole the conclusion that must be drawn is that the driver of the military truck was overtaking without regard to oncoming traffic, that the taxi was wholly on its own side but its right of way was blocked by the truck and that the driver of the military truck was therefore solely to blame for the accident. In the instant case the court was justified in interfering with the apportionment of liability of the learned trial judge as he had made the wrong inferences from the facts.

Cases referred to:-

(1) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372, 1376.

(2) *Brown* v. *Thompson* [1968] 1 W.L.R. 1003.

(3) *Quintas* v. *National Smelting Board* [1961] 1 W.L.R. 401, 409.

FEDERAL COURT.

K. E. Hilborne (*Edgar Joseph Jr.* with him) for the appellants.

D. H. Murphy for the first and second respondents.

D. L. Pickard for the third respondent.

Khoo Eng Chin for the fourth respondent.

Cur. Adv. Vult.

Ong C.J.: At about 1.30 p.m. on March 4, 1968 a 5-ton Bedford military truck driven by L/Cpl. Tek Bahadur along the Tampin-Seremban Road collided almost head-on with a Mercedes taxi belonging to the Sepang Omnibus Co. and overturned. In doing so it fell upon a Volkswagen motor-car, which was following the taxi, crushing its driver to death. Three persons in the taxi, including its driver, also died of their injuries. In an action for damages brought by the widow and dependants of Lo Ki Nang, driver of the Volkswagen, the learned trial judge of the High Court in Seremban held the drivers of the military truck and the taxi blameworthy in the proportion of 25% and 75% respectively and awarded damages accordingly. Another defendant, Mohamed Shariff, was sued as contributing by his own act to the accident, but he was exonerated from blame. The owners of the taxi now appeal against the said decision. They contend that on the evidence the learned judge should have held, either that L/Cpl. Tek Bahadur's negligence was the sole cause of the accident, or that he and Mohamed Shariff were jointly at fault. There is no dispute as to the quantum of the award.

Four vehicles were in fact involved in the accident. Two of them were proceeding towards Seremban and the other two in the opposite direction. For more than a mile before the collision the truck had been following Mohamed Shariff northwards in his Morris 1100. At the 20½ milestone Mohamed Shariff stopped to set down Zainab, a schoolgirl passenger, opposite the gates of her house, situated on his left. The road appeared clear of oncoming traffic. The truck was a considerable distance behind but visible. By the time Mohamed Shariff set his car in motion again the truck had come up very close behind him. He then saw two cars approaching — they had just appeared over the brow of the hill. The taxi was ahead of the Volkswagen — how far ahead he did not say — and "close to the centre white line". The Volkswagen was "close to the edge of the road". When it was almost alongside of Mohamed Shariff — in his own words "about to pass me" — he heard a bang and, viewing the scene on his rear mirror, he saw the truck toppling over on top of the Volkswagen. He stopped, but did not get down and after a few moments continued on his journey towards Seremban. According to him the collision occurred, not in front of Zainab's house, but about 100 yards past it. On this salient fact he is corroborated by inspector Ahmad Nasri, the investigating officer. No measurements had been taken of the actual distance,

but from Zainab's evidence, it was probably less than 100 yards.

The lance-corporal and sergeant Sher Bahadur Gurung, his front-seat passenger, told an identical story (but different from that of Mohamed Shariff) which was itself inconsistent with the evidence given by them at inquest proceedings held on January 7, 1969 by the magistrate at Rembau. In the High Court, L/Cpl. Tek Bahadur said he had been following Mohamed Shariff's car at a constant moderate speed for more than a mile, maintaining a distance of 25 to 40 yards between their respective vehicles. At the 20½ milestone he "saw two vehicles coming over the brow of the hill. They were approximately over 50 yards away and they were level with each other" when he saw them. At that moment, he alleged, Mohamed Shariff who was ahead of him suddenly halted his car "in the middle of the carriage-way", compelling him to pull up 2 or 3 feet behind the Morris. In that position he claimed that his truck had come to rest in a straight line behind the other vehicle, and there was still a space of about 2 feet between his truck and the white line marking the middle of the road, when the taxi crashed into his truck at a speed of 60 to 70 m.p.h. The impact tore off his offside front wheel, lifted the front of the truck and caused it to move across the road before it crashed upon the Volkswagen.

At the inquest 9 months earlier, however, L/Cpl. Tek Bahadur had testified, not once but repeated it, that in order to avoid ramming the car in front he had to swerve to his right. He could have swerved to the left with utmost safety. His explanation for the truck moving across the road to its wrong side was that, when the taxi struck his vehicle, his "foot which was on the accelerator could have been off the brake". He then grudgingly had to admit that his truck was jutting out past the white line when it came into collision with the taxi.

The trial judge preferred this version, holding that the lance-corporal did swerve to the right, as he had said earlier, and that "in all probability the truck might not have come to a complete halt when the collision occurred". I agree with this view. The lance-corporal had no explanation to offer why the drag-marks made by the wheel of the taxi, "L-M" and "J-K", were on its proper side of the road. In this connection it is important to observe that "O-N", a *rear* wheel skid, was made by the truck showing the direction it was taking towards the *right* and, being a mark made by the rear wheel, it proved conclusively that the front half of the vehicle must have been well over the taxi's right-of-way. It need hardly be added that the explanation of the right foot being lifted off the accelerator by the force of the impact was absurd if that same foot was already stepping on the brake-pedal. It is further demonstrable that the lance-corporal's story was false. The truck is 7 feet 9 inches wide. If it was only 2 to 3 feet directly in line behind the Morris, it could not have slewed across the road without damage to the car.

As regards Mohamed Shariff's evidence the judge took the view that in material particulars he was telling the truth and that he was in no way to blame for the accident. That finding I do not think can be seriously challenged. The acid test of truth, which appeared to have been overlooked, was that the collision took place well past the gates to Zainab's house. The allegation that Mohamed Shariff stopped suddenly and without warning might have been plausible had the accident occurred opposite the gates where the car should naturally have stopped for her to alight.

It has to be remembered that the lance-corporal, when he caught up with Mohamed Shariff, could not see over the brow of the hill which was ahead of him. The road appeared clear except for the slow-moving Morris, which was just getting into gear. What more natural then that the lance-corporal should have failed to decelerate but considered it safe enough to overtake, even if he had to go over the white centre line? Then two vehicles came into view over the brow of the hill. According to him the limit of his vision then of the road ahead was about 50 yards and when he "first saw the other vehicles his (truck) was about 25 yards behind the white car" *i.e.* the Morris. Assuming that the taxi was travelling at 60 m.p.h. and the truck at 30 m.p.h. the gap between those two vehicles was closing at the rate of about 135 feet per second. Therefore, whoever was at fault in not keeping within his own half of the road was clearly responsible for all the consequences of his acts.

As regards the position of the taxi Mohamed Shariff had no axe to grind when giving evidence. He did not change his story between the inquest and the trial. When he resumed his progress after setting down the girl he noticed two vehicles approaching at speed. "One vehicle was ahead of the other" he said, "the vehicle ahead was close to the centre white line. The one at the rear was close to the edge of the road .... When I saw the oncoming vehicles I did not notice whether one was overtaking the other ... The offside of the taxi was travelling along the white line". Lance-corporal Tek Bahadur, on the other hand, stated that when he saw the two oncoming cars, they were level with each other. If he was not to be believed as to Mohamed Shariff coming to a sudden stop, I do not think any weight can be attached to his self-exculpatory evidence when it is contradicted by Mohamed Shariff and by his earlier evidence and, moreover, is demonstrably false. The worst that can be said of the taxi was that it went as far as the middle line of the road. Had the truck been keeping to its own side, it is clear that nothing would have happened. But whether the taxi was on the white line or even several feet away from it, the truck had encroached enough on the taxi's right of way to render the accident inevitable. The judge thought it "probable that the front offside wheel of the truck was somewhere between point L to N on the sketch plan at the time of the collision". Had he remembered the evidence of the Gurkha officer (D.W. 5) that "O" to "N" was a *rear* wheel skid and that "the vehicle would be across the road at some time", which must necessarily be the time when the mark was made by the truck in motion after application of its brakes, the conclusion becomes inescapable that a good part of the truck was so far across the path of the taxi that there was nothing its driver could do to avoid the collision.

The learned trial judge expressed his view at some length why he considered the negligence of the taxi-driver was the main and effective cause of the accident. With all respect, I think the inferences he drew cannot be supported by the evidence. His finding that the taxi was "in the process of overtaking the deceased's car" when it collided with the truck did not take sufficient account of Mohamed Shariff's evidence. Elsewhere in his judgment the judge had stated his belief that, at the time of the collision, the taxi "had just passed the deceased's car and was at the point of going back or was in the process of going back to his side of the road". He went on as follows: —

"It may also be true that at the time of the collision, the taxi was ahead of the deceased's car. But that does not mean that the taxi had safely overtaken the deceased's car. To my mind, the process of overtaking cannot be said to have been completed until the taxi could safely return to its correct side after overtaking, and could safely do so without endangering the leading car or other on-coming vehicles. This is especially so when both the leading car and the car overtaking are travelling at a great speed. The fact that the deceased's car had collided with the truck immediately after the collision with the taxi clearly showed that, at the time of the collision, the deceased's car must have been travelling very close to the taxi."

With respect, while I agree with the view expressed on overtaking, I do not think that in apportioning blame sufficient regard had been paid to the facts in this particular case. There was not a scrap of evidence that the taxi was not on its own side of the road at all times, even when it came over the brow of the hill. Having overtaken the Volkswagen before then, it was already seen in process of moving back farther within its own half of the road — as the judge himself observed, in relation to the tyre marks made by the taxi. On the other hand, the judge had also found that the truck was in motion across the road, having swerved right "to avoid colliding" with the car ahead. Having found as a fact that the car did not stop dead as alleged, it follows that the truck was in fact moving to the right in order to overtake — not to avoid a collision — and this the lance-corporal should not have done had he been careful enough to keep a proper lookout. We have ourselves looked at the brow of the hill at the 20½ mile from both sides. It was a gentle slope and from the elevation of his driving seat the lance-corporal should have been able at all times to see much farther than the driver of an ordinary low-slung vehicle — in this instance, at least 100 yards. Was he keeping a proper lookout if he failed to see the on-coming vehicles till they were only 50 yards away? It has again to be remembered that the top of the truck, being something like 10 feet high, must have come into view over the top of the incline to drivers approaching from the other side of the hill before they reached the top. This should have provided sufficient warning for the taxi to return to its own side, as it did in fact — even if it had to encroach on the wrong side earlier on overtaking. It was further said that the deceased's Volkswagen must have been travelling *very close* behind the taxi because it collided with the truck immediately after the collision. With respect, I do not think this is the necessary or correct inference for holding that the taxi was in process of overtaking when the collision took place. The Volkswagen was crushed when the truck overbalanced and capsized upon it. It was not an instantaneous process — this keeling over of the heavy vehicle. There is nothing in the evidence from which it could be inferred that the Volkswagen was not more than, say, 50 yards behind the taxi when the taxi hit the truck. On this point, it is pertinent to observe that the deceased had both the time and the opportunity to take evasive action. He had gone wholly on to the wide grass verge seeing the truck blocking his path when the top of the truck fell upon his car. Finally, as may be seen from the photographs, I think that whatever the explanation for Mohamed Shariff applying his brakes, the lance-corporal on his slow-moving truck had every opportunity to swerve left instead of to the right. The grass verge to the left was wide, clear and inviting. Even ramming the Morris was a lesser evil than to meet the taxi head-on. The conclusion I would draw, therefore, from the evidence as a whole is that the lance-corporal was overtaking without proper regard for oncoming traffic, that the taxi was wholly on its own side but its right of way was blocked by the truck, and the lance-corporal was solely to blame.

To conclude, I think it is useful to remember the principles to be applied in appeals against apportionment of liability for contributory negligence. This has been succinctly stated by Lord Denning M.R. in *Kerry* v. *Carter*[1] as follows: —

"We have been referred to cases on this subject, particularly in the recent case of *Brown* v. *Thompson*.[2] Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p. 1012, by Edmund Davies L.J. when he quoted from the judgment of Sellers L.J. in *Quintas* v. *National Smelting Board*.[3] This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong."

I would allow this appeal, set aside such part of the order of the court below as declares the appellants liable for contributory negligence and declare respondent thirdly abovenamed solely liable for the damages assessed, and as to costs, the said respondent will pay all costs of the parties in the action and of this appeal. The plaintiffs' costs, however will not include costs in this appeal.

Gill F.J. and **Ong Hock Sim J.** concurred.

Appeal allowed.

Solicitors: *Joseph & Son; Murphy & Dunbar; Donaldson & Burkinshaw; Khoo & Sidhu.*